



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
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RULES PROCESSING TEAM

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Memorandum

To: Rules Processing Team, Minerals Management Service

From: Chief, Division of Consultation, Habitat Conservation Planning, Recovery and State Grants
Richard P. Sayers

Subject: Proposed Rule, Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Plans and Information—Protection of Marine Mammals and Threatened and Endangered Species (RIN 1010-AD10)

This is in reference to your *Notice of Proposed Rulemaking on Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Plans and Information—Protection of Marine Mammals and Threatened and Endangered Species*, published September 6, 2005 (70 FR 52953). The purpose of the proposed rule is to amend regulations on exploration and development plans found at 30 CFR 250, which became effective September 29, 2005 (70 FR 51478), to require information of lessees of federal oil and gas leases in the OCS in compliance with Section 7 of the Endangered Species Act of 1973, as amended (ESA), and the requirements of the Marine Mammal Protection Act of 1972, as amended (MMPA). We believe the proposed amendments will prove to be a benefit to lessees and the Minerals Management Service (MMS) by expediting the Section 7 consultation process and assisting lessees in complying with the ESA and MMPA and support these efforts.

MMS proposes to amend the regulations at 30 CFR part 250, which list and describe the information that lessees and operators must submit to support plans for exploration and development of federal leases on the outer continental shelf. The amendments require: (1) submission of site-specific information on the presence of federally listed threatened and endangered species and their designated critical habitat, marine mammals protected under the MMPA, and marine sanctuaries and other important habitats; (2) monitoring of impacts to these resources, including incidental take of listed species and marine mammals; (3) a description of any mitigation measures; and (4) an analysis of potential direct and indirect impacts to these species and habitats.

Although we believe the information provided for requirements under the MMPA is sufficient, we recommend the following changes to further expedite the consultation process and assist compliance with the ESA.

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The proposed amendments to facilitate compliance with Section 7 of the ESA currently only apply to listed species and designated critical habitat. We recommend requiring this information for proposed species and proposed critical habitat as well in order to expedite formal consultation following an eventual listing. In such circumstances, the Service would prepare a Conference Opinion, which could be converted quickly to a Biological Opinion in the event of an eventual listing or designation. Having a completed Conference Opinion could prevent or reduce significantly any disruption to a lessee's ongoing operations resulting in either "take" of a newly listed species or adverse affects to newly designated critical habitat.

Also, we recommend including in the proposed amendments a requirement to monitor and report effects to listed species and critical habitat, if applicable. The proposed amendments currently only require monitoring and reporting of incidental take of listed species. In the regulations implementing section 7 of the ESA, one of the triggers for reinitiating formal consultation is if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered (50 CFR 402.16(b)). Including monitoring and reporting of effects to listed species and critical habitat would assist MMS in knowing whether reinitiation was necessary.

Similarly, the proposed amendments require inclusion of mitigation measures designed to avoid or minimize incidental take of threatened and endangered species and marine mammals, but do not have similar requirements explicitly for critical habitat. Since it is possible that future designations and biological opinions could require the inclusion of conservation measures to ensure critical habitat is not adversely modified or destroyed, we recommend requiring appropriate mitigation measures in the regulations that help avoid and minimize impacts to critical habitat, where applicable.

Finally, in the Section entitled, "Supplementary Information," there is a bullet referring to monitoring programs required by Section 7 consultation which states, "To determine the effectiveness of reasonable and prudent alternatives and their implementing terms and conditions" (emphasis added). We believe you meant to refer to "reasonable and prudent measures," which have implementing terms and conditions.

Thank you for the opportunity to comment on the proposed rule. If you have any questions regarding this memorandum, please contact Dan Buford at (703) 358-2106.